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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH RODRIGUEZ MONTGOMERY,

Defendant and Appellant.

G048756

(Super. Ct. No. 11CF3033)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed as modified.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Joseph Rodriguez Montgomery, Manuel Daniel Garcia and Adrian Solis Barrera of robbery and attempted robbery, and found true sentence enhancement allegations that the crimes were committed for the benefit of, at the direction of, or in association with the “17th Street” criminal street gang.¹ The trial court denied probation and sentenced defendant to a three-year term for the robbery, plus a concurrent two-year term for the attempted robbery and a consecutive 10-year term for the street gang enhancement. Montgomery challenges the sufficiency of the evidence to prove the gang enhancement. We reject this challenge.

He also claims the trial court improperly stayed sentence for the gang enhancement on count 2, an error the Attorney General concedes, and claims we must remand the matter to allow the sentencing court to exercise its discretion under Penal Code section 1385 to strike sentence for the enhancement. We disagree that remand is required and modify the judgment accordingly. As modified, the judgment is affirmed.

FACTS

Around midnight on November 6, 2011, Aaron Anguiano and his cousin, Christopher Martinez, were walking to Anguiano’s car on Harbor Boulevard near 17th Street in Santa Ana after buying a taco at a taco stand. A gray Suburban pulled into a parking lot in front of them, partially blocking the sidewalk, and three young men got out of the Suburban and approached them. The men asked, “Where are you guys from?” One of them grabbed Anguiano’s pockets and said, “What do you have on you[,]” and “Give me all your shit.” Anguiano replied, “Hey, I don’t have anything. I’m not looking for any trouble.”

One of the men had a knife, and threatened Anguiano with it. Anguiano testified he was “concerned for [his] own safety, [and that of his] cousin’s,” and that his “adrenaline was kind of rushing.” He showed the men his empty wallet. He also showed

¹ The defendants pursued separate appeals. (*People v. Garcia* (May 20, 2014, G048407) [nonpub. opn.]; *People v. Barrera* (Sept. 16, 2014, G048472) [nonpub. opn.]..)

them his cell phone and said, “Just go ahead and take it.” The men grabbed Anguiano’s cell phone and car keys, hit him in the face, and told him to “turn and walk.” Anguiano and Martinez walked to a motel and called the police.

A few minutes later, police responding to Anguiano’s call stopped Montgomery, Garcia, and Barrera in a gray Suburban. Anguiano’s cell phone was on the back seat of the Suburban. Anguiano’s keys were in Barrera’s pocket. A knife was found between two poles of a chain link fence about 75 yards from the parked Suburban.

At the scene, Anguiano identified Garcia and Barrera as two of the three individuals that robbed him. At trial, Anguiano identified Garcia as the man with the knife and the person who hit him, and he testified the knife found near the Suburban looked like the one used in the robbery. He testified Barrera was the person who demanded he turn over his belongings. Anguiano also identified Montgomery as one of the robbers, although he was not 100 percent sure, and he said Montgomery stood back and looked around while Garcia and Barrera were taking his property.

Santa Ana Police Detective Jorge Lopez testified as an expert on criminal street gangs. He opined 17th Street was a criminal street gang in Santa Ana with about 150 members in November 2011.

Detective Lopez explained the culture of criminal street gangs in general and 17th Street in particular. Like many other gangs in Santa Ana, 17th Street started as a 1950’s car club, which slowly morphed into an association of people whose primary activity is the commission of crimes. At the time of the instant crimes, the primary activities of 17th Street gang members were firearm possession and vehicle thefts.

Criminal street gangs often claim a particular area of a city as their “turf.” Seventeenth Street’s claimed territory is south of the 22 Freeway, north of Hazard Avenue, east of Euclid Street, and west of Newhope Street, and includes portions of Garden Grove. Gangs also develop alliances and rivalries with other criminal street gangs. The Hard Times street gang is a 17th Street rival. Members of 17th Street use

derogatory names such as “Hard Tacos” for Hard Times’s gang members. The robbery of Martinez and Anguiano took place in the Hard Times’s territory, about half a mile from 17th Street’s claimed territory.

Detective Lopez explained criminal street gangs use respect as a status mobility system predicated on their commission of violent crimes. Striving for respect fosters antisocial behavior, which includes committing crimes and instilling fear among nongang members living in the gang’s claimed territory. Instilling fear in the community helps the gangs commit crimes because people are reluctant to cooperate with authorities for fear of retaliation. Violent crimes increase the individual gang member’s status, instill fear in the community and elevate the whole gang’s status, and individual gang members believe status and respect are based on the fear engendered by their crimes.

A gang’s status also keeps rival gangs from invading their territory on account of their reputation and fear of being assaulted. If a gang is perceived as weak, a rival will claim their territory. For instance, maintaining control over certain areas associated with narcotics sales may be particularly important to gangs as a revenue source for the gang. At the same time, committing crimes in a rival’s territory elevates the other gang’s status.

“Putting in work” for a gang means committing crimes for the benefit of the gang. Committing gang-related crimes elevates the individual gang member’s status in his or her gang, demonstrates dedication and commitment to the gang, and builds trust with other members of the gang. One of the ways new members join the gang is by “criming in” or committing a crime for the gang, although new members may also join by enduring an assault by gang members, “jumping in,” or by “walking in” when they are just accepted due to familial relations.

Gang members commit crimes with other gang members because they can trust them not to inform the police. “Backing up” means supporting fellow gang members by assisting in crimes to provide moral support. There are repercussions to

gang members who do not backup fellow gang members. As gang members become more seasoned, they often take on more advisory roles and allow the newer recruits to commit crimes.

Detective Lopez opined Montgomery was a well-entrenched gang member because he had claimed the gang numerous times when contacted by the police, had several 17th Street tattoos, and claimed the gang moniker “Suspect.” Detective Lopez also stated Barrera was at least an associate, if not a member of 17th Street, and that Garcia was either a new associate of 17th Street or “criming in” to the gang by committing the instant robbery and attempted robbery. Detective Lopez found it significant that Montgomery, the most seasoned gang member, kept watch while Barrera and Garcia dealt with the robbery victims. Detective Lopez stated this fact demonstrated Montgomery, a known 17th Street gang member, trusted Barrera and Garcia. Garcia’s violent behavior with the knife may have been “criming in” to 17th Street, and it shows he is committed to the gang, possibly enhancing his status from an associate to a member.

Based upon a hypothetical mirroring the evidence adduced at trial, Detective Lopez opined the crimes were committed for the benefit of and in association with a criminal street gang. He explained 17th Street received the tangible benefits of the phone and keys. They also received the intangible benefits by committing a violent crime in rival gang territory, and earning respect in their gang and enhancing their reputation in the community. Also, an associate criming into the gang benefits the gang by adding another member.

Finally, Detective Lopez explained the crimes were committed in association with a criminal street gang because they involved at least one gang member and two associates working in conjunction and operating together. One was the lookout, another held the knife, and the third patted the victims down and took their property. This conduct also furthered and promoted criminal conduct by gang members.

DISCUSSION

Montgomery challenges the sufficiency of the evidence to support the jury's true findings on the criminal street gang enhancements. (Pen. Code, § 186.22, subd. (b).) Specifically, he contends there was no evidence the crimes were committed for the benefit of 17th Street, and the contrary opinion of Detective Lopez is just speculation. We disagree.

“[T]he reviewing court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citation.] If the circumstances reasonably justify the jury's finding, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citation.] For evidence to be ‘substantial’ it must be of ponderable legal significance, reasonable in nature, credible and of solid value. [Citation.]” (*People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1511.)

“In making our determination, we focus on the whole record, not isolated bits of evidence. [Citation.] We do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact. [Citation.] We will not reverse unless it clearly appears that on no hypothesis whatever is there sufficient substantial evidence to support the jury's verdict. [Citations.]” (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1322.) We review the sufficiency of the evidence to support a true finding on an enhancement under the same standard as for a conviction. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Penal Code section 186.22, subdivision (b) imposes additional or alternative punishments for felony offenses committed “for the benefit of, at the direction of, or in association with any criminal street gang,” and “to promote, further, or assist in any criminal conduct by gang members.” (*Id.*, subd. (b)(1).) Collateral effects of the crime, including respect or fear of the gang and revenge, have all been found to constitute

a “benefit” to the gang. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384.) A specific intent to promote, further, or assist in any criminal conduct by gang members is required, but a specific intent to benefit the gang is not. (*People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*).)

Morales is particularly instructive. In that case, the defendant and two fellow gang members committed a robbery and other offenses. Based upon a hypothetical question, the gang expert testified the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang because “they involved three gang members acting in association with each other. The gang provided ‘a ready-made manpower pool’ That is, one gang member would choose to commit a crime in association with other gang members because he could count on their loyalty. They would ‘watch his back’” “The crime would benefit the individual gang members with notoriety among the gang, and the gang with notoriety among rival gang members and the general public.” (*Morales, supra*, 112 Cal.App.4th at p. 1197.)

Morales rejected the defendant’s argument that there was insufficient evidence that he committed the offenses to *benefit* his gang, and instead noted the gang expert’s focus was on “a crime committed, not just by a gang member, but by several gang members, acting in association with each other. Also, [the expert] did not testify that such a crime necessarily would benefit the gang, merely that it would be committed *either* for the benefit of, *or* at the direction of, *or* in association with the gang.” (*Morales, supra*, 112 Cal.App.4th at p. 1197.)

Morales also rejected the defendant’s argument that reliance on evidence one gang member committed a crime in association with other gang members is circular. “Arguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang. The crucial element, however, requires that the crime be committed (1) for the benefit of, (2) at the direction of, *or* (3) in *association* with a gang. Thus, the typical close case is one in

which one gang member, acting alone, commits a crime. Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members.” (*Morales, supra*, 112 Cal.App.4th at p. 1198.)

Finally, *Morales* set aside the defendant’s argument there was insufficient evidence of specific intent, as opposed to benefit, direction or association. “Again, specific intent to *benefit* the gang is not required. What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’ Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with Flores and Moreno, and that he knew that Flores and Moreno were members of his gang. . . . It was fairly inferable that he intended to assist criminal conduct by his fellow gang members.” (*Morales, supra*, 112 Cal.App.4th at p. 1198.)

All of the same can be said in this case. Here, Montgomery, a known 17th Street gang member, committed robbery and attempted robbery with two associates of the gang, Garcia and Barrera. Based upon a hypothetical, Detective Lopez testified the crimes were committed for the benefit of and in association with 17th Street, because they involved at least one member and two associates working in conjunction and operating together. Seventeenth Street provided a ready-made manpower pool of members or associates that could be trusted not to inform the police and to provide backup. In addition, crimes would benefit Montgomery, Garcia, and Barrera with notoriety within 17th Street. And the crimes would benefit 17th Street with notoriety in the community, and among rival gang members, particularly since the crimes were committed in rival gang territory.

So we reject Montgomery’s argument there was insufficient evidence that he committed the offenses to *benefit* 17th Street. Here, as in *Morales*, the gang expert’s

focus was on crimes committed by several gang members or associates, acting in association with each other. Also here, as in *Morales*, Detective Lopez testified the crimes were committed for the benefit of *and in association* with 17th Street, not just for the benefit of 17th Street. Admittedly, Montgomery, Barrera, and Garcia could have been on a frolic and detour unrelated to 17th Street, but we note their crimes in this case started with the classic gang challenge, “Where are you guys from?”

And, to the extent Montgomery argues there was insufficient evidence of specific intent, we reiterate specific intent to *benefit* 17th Street is not required. “What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members’” (*Morales, supra*, 112 Cal.App.4th at p. 1198.) “In sum, if substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*People v. Albillar* (2010) 51 Cal.4th 47, 68.)

Here, there was evidence Montgomery intended to commit the robbery and attempted robbery, in association with Barrera and Garcia, and he knew they were members or associates of 17th Street. Thus, the jury could reasonably infer Montgomery had the specific intent “to promote, further, or assist in any criminal conduct by gang members” (Pen. Code, § 186.22, subd. (b)(1).)

We are also not persuaded by Montgomery’s argument a gang expert’s opinion must be supported by additional evidence demonstrating the crime was committed to benefit a gang. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650; *People v. Ramon* (2009) 175 Cal.App.4th 843; *People v. Albarran* (2007) 149 Cal.App.4th 214; *In re Frank S.* (2006) 141 Cal.App.4th 1192.) The California Supreme Court has more recently held: “‘Expert opinion that particular criminal conduct benefited a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22,

subdivision (b)(1), gang enhancement. [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

In any event, all of these cases are distinguishable on other grounds. *People v. Ochoa, supra*, 179 Cal.App.4th 650 and *In re Frank S., supra*, 141 Cal.App.4th 1192 both involved crimes committed by one gang member, acting alone, not multiple gang members acting together. In *People v. Ramon, supra*, 175 Cal.App.4th at page 851 the gang expert “simply informed the jury of how he felt the case should be resolved,” and, not surprisingly, the appellate court held this to be an improper expert opinion on the ultimate issue to be decided. No such improper opinion was given in this case. And *People v. Albarran, supra*, 149 Cal.App.4th at page 228 involved neither the sufficiency of the expert’s opinion nor a substantial evidence issue. Instead, the appellate court held the gang evidence was irrelevant to the underlying charges and extraordinarily prejudicial.

Montgomery’s reliance on *People v. Ferraez* (2003) 112 Cal.App.4th 925 (*Ferraez*), is also misplaced. In *Ferraez*, the defendant challenged the sufficiency of the evidence to prove he was guilty of street terrorism, the substantive gang crime described in Penal Code section 186.22, subdivision (a). While it is true the appellate court stated, in passing, “[u]ndoubtedly, the expert’s testimony alone would not have been sufficient to find the drug offense was gang related[,]” (*Ferraez, supra*, 112 Cal.App.4th at p. 931) the appellate court was not discussing the sufficiency of the evidence to prove the defendant committed the drug offense “for the benefit of, at the direction of, or in association with the specific intent to “promote, further, or assist in criminal conduct” by gang members. (Pen. Code, § 186.22, subd. (b)(1).) Plus, the appellate court went on to note that the gang expert’s opinion was “coupled with other evidence from which the jury could reasonably infer the crime was gang related.” (*Ferraez, supra*, at p. 931.) Here, the gang expert’s testimony was bolstered by evidence of Montgomery’s long association with 17th Street and the gang hit-up that started the robbery.

Montgomery also claims, and the Attorney General concedes, the trial court erred by imposing a Penal Code section 654 stay on the gang enhancement attached to count 2.² We agree and modify the judgment.

The trial court imposed the three-year midterm on count 1, plus 10 years for the gang enhancement. On count 2, the trial court imposed a concurrent two years for the attempted robbery, plus 10 years on the gang enhancement. The trial court erred by then staying sentence for the enhancement related to count 2 under Penal Code section 654. As the Attorney General concedes, the trial court may not treat a dependent enhancement differently than its underlying felony. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310-1311.)

Nevertheless, Montgomery goes on to assert the trial court's intention was to strike sentence for the gang enhancement attached to count 2, primarily relying on a series of e-mails between the prosecutor and the court clerk. However, these e-mails do not prove what Montgomery claims they do. In fact, the trial court stated, "It's the court's intent to sentence [Montgomery] to state prison for the aggregate term of 13 years. [¶] . . . [¶] As to count 1, which is the primary determinative count with a principal term because with the enhancement it has the highest possible sentence, the defendant is sentenced to state prison for the term of three years, which is the base midterm. [¶] As to count 2, the attempted robbery, the defendant is sentenced to state prison for the term of two years, which is midterm full term concurrent to count 1. [¶] As to the enhancement, the [Penal Code section] 186.22 [, subdivision] (b)(1), criminal street gang activity, found to be true as to count 1, defendant is sentenced to state prison for the term of 10 years consecutive to count 1. This is a statutory term. [¶] As to the enhancement [Penal Code section] 186.22[, subdivision] (b)(1) found to be true as to count 2, defendant is sentenced to state prison for the term of 10 years concurrent to count 1"

² The Attorney General's request for judicial notice of the appellate record in *People v. Barrera* (Sept. 16, 2014, G048472) [nonpub. opn.] is granted.

Based on a fair reading of the record, the appropriate remedy is imposing a concurrent term on count 2 and its related gang enhancement. (Pen. Code, § 1260.)

DISPOSITION

The clerk of the superior court is directed to amend the abstract of judgment to reflect the imposition of concurrent terms on count 2 and its related gang enhancement and forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.